Supreme Court, U.S.
FILED

95 • 273 AUG 16 1995

No. 95- OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOHN G. ROBERTS, JR. *
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the disclosure of documents subject to the attorney-client privilege waives the privilege with respect to those documents, as well as other undisclosed privileged documents on the same subject, where the disclosed documents were produced inadvertently by counsel and without the knowledge or consent of the client.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Petitioners are Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel. They were petitioners before the United States Court of Appeals for the Third Circuit and defendants in the United States District Court for the Middle District of Pennsylvania. Pursuant to S. Ct. Rule 29.1, petitioner Keystone Sanitation Company, Inc., notes that it has no parent companies or non-wholly owned subsidiaries.

Arcata Graphics Fairfield, Inc. (now known as Quebecor Printing Fairfield Inc.) was a respondent before the Court of Appeals and a defendant in the District Court, and is a respondent before this Court. The District Court understood Arcata to be acting in connection with this dispute on behalf of itself and co-defendants C & J Clark America, Inc., the Esab Group, Inc., The Genlyte Group, Inc., Hanover Bronze and Aluminum Foundry, Inc., Kemper Industries, Inc., R.H. Sheppard Company, Inc., and SKF USA, Inc.

In addition to these companies, other defendants in the underlying litigation, who did not participate in the dispute that is the subject of this petition either in the District Court or the Court of Appeals, are Advanced Disposal Service, Aero Oil Company, Agricultural Commodities, Inc., d/b/a or f/d/b/a Agcom, Inc., Agway Petroleum, American National Can, Ames Department Store, Amp Inc., Andgrow Fertilizer, Inc., Arentz Roofing, Aristokraft, Inc., B & B Auto Body Shop, B & K Trucking, Inc., Bair Wooden Products, Baltimore Gas & Electric, Baum & Hersh Association, Inc., Beeler Box Company, d/b/a or f/d/b/a Beeler Manufacturing, Bermudian Springs School District, Bethenergy Mines Corporation, formerly operating as Bethlehem Mines Corporation, Bibb Co., Inc., d/b/a or f/d/b/a Malcolm Spinning Co., Biglerville Schools Upper Adams County School District, Black's Sunoco, Inc., Blue Bird Fabric Corporation, Bon-Ton Foods, Inc., Biglerville Borough, Bonneau-

ville Borough, Dillsburg Borough, Borough of East Berlin, Borough of Gettysburg, Hanover Borough, Borough of Lemoyne, Littlestown Borough, Borough of New Oxford, Borough of York Springs, Breams Print Shop, Brooks Show Company, Cadbury Beverages, Inc., successor to and formerly doing business as Duffy Mott Company, Inc., Cambridge Rubber Company, Capital Products, also or formerly known as Ethyl Corp., Clyde A. Wenschhof, Jr., Coldsmith Roofing, Colonial Shoe Company, Colonial Fiberglass, Columbia Gas Transmission Company, Conewago Contractors, Inc., Conewago Township, Continental Wire & Cable, also or formerly kown as Anaconda-Ericson, Coulsen Heel Company, Cramer Zeigler Tire Company, CSX Transportation, formerly known as, and successor to, Western Maryland Railway Company, D.K. Hershey, Dal-Tile Corporation, Del-Wood Kitchens, Der-Text of Pennsylvania, Donald B. Smith, Doubleday Book & Music Club, Inc., Duplex Products, Inc., Earl Barnhart Contractors, Eastern Waste Industries, Eddie's Cleaners, Eicholtz Co., Eisenhart Wallcoverings Company, Emeco Industries, Inc., F & W Blacktopping, Foster Stonseifer Sanitation, Freeman Shoe Company, Gam Printing, Gerlach Insulation, Germantown Refuse, Germany Township, Gettysburg College, Gettysburg Hospital, Gettsyburg Transformer, The Gettysburg Times, Gettysburg Municipal Authority, Gettysburg Area School District, Giant Foods, Gobrecht Trash Removal, Inc., Goodyear Tire Center, Grover Hansford, Guildcraft, Inc., d/b/a Guildcraft Furniture & Bedding, Hanover Brands, Hanover District, Inc., Hanover General Hospital, Hanover Industrial Machine, Hanover Industries, Hanover Klondike, Hanover Pen, Hanover Potato Products, Inc., Hanover Transfer Company, Hanover Wire Cloth, HBH Contractors, Inc., Heidelburg Township, Henson Paving Company, Inc., Herff Jones Yearbooks, Hill's Stores, d/b/a or f/d/b/a Hills Department Stores, Inc., H.M. Kelley, Inc. Trucking, Hoffheins Brothers, Hostetter Construction Corporation, Inland Container, Jamesway Corporation, J.A. Myers Building and Development, Inc., J.F. Rohr-

baugh & Company, Inc., John Jacobs, K-Mart Corp., Knouse Foods Cooperative, L.M. Klunk & Sons, Leinhardt Brothers Furniture, Lionel Kiddie City, Littlestown Laundry, Littlestown Pattern Works, Littlestown Hardware & Foundry, Lowe's Home Centers, Inc., Master Roofers, Inc., McClarin Plastics, McSherrystown Borough Office, Menellan Township, Metropolitan Edison, Miller Chemical and Fertilizer Corp., Mobil Oil Corp., d/b/a or f/d/b/a Electro-Phosphorus Co., Montgomery County Sanitation, for itself and as successor to Lake Forest East Village Refuse, Inc., Morton Building Plant, Mount Pleasant Township, Neiderer Sanitation, Nell's, Inc., Nevin L. Barnhart Contractors, New Oxford Municipal Authority, Oxford Township Municipal Building, Oxford Container Company, Commonwealth of Pennsylvania Department of Environmental Resources, Commonwealth of Pennsylvania Department of Environmental Resources, Bureau of State Parks, Cocorus State Park, Commonwealth of Pennsylvania, Department of Transportation, Commonwealth of Pennsylvania Department of Military Affairs, Paradise Township, Penn Auto Body Shop, Penn Township, Penn Township Waste Water Treatment Plant, Penn-Marr Castings, Ray Mar Roofing, Refuse Removal Service, Rental Uniform Service, Robert A. Kinsley, Inc., Round Hill Foods, Inc., Schindler Corp., Schmucks, Schuchart Oil and Propane Sealed Air Corporation, also or formerly known as Jiffy Packaging Company, Seneca Valley Refuse, Shepherd Aluminum Products, Sheridan Press, Sketchley Services, Inc., also or formerly known as Coyne and/or Rentex Corporation, Ski Liberty, Snyder's of Hanover, Inc., formerly known as Hanover Guest Quality, Inc., Sonoco Products Company, Spectrakote Corporation, Superior Plating, Sylvania Shoe, The Lumber Yard, Thomas B. Lawyer, 3-D Manufacturing, Titus Trash Removal, Trimen Industries, Inc., Union Township, United Disposal Corporation, U.S. Shoe Corp., successor to and f/d/b/a Freeman Shoe Company, Utz Potato Chip Company, Village Disposal, Inc., Waste Management of Pennsylvania, Wildason Roofing & Re-

modeling, City of York, York Waste Disposal, Inc., and York Graphic Services, Inc.

The plaintiff in the underlying litigation, which also did not participate in the instant dispute either in the District Court or the Court of Appeals, is the United States of America. The District Court judge—the Hon. Sylvia H. Rambo—was also a nominal respondent in the mandamus action before the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT RULE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE FEDERAL COURTS ARE DIVIDED AS TO THE EFFECT OF AN INADVERTENT DISCLOSURE OF INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND HAVE ADOPTED THREE DIFFERENT APPROACHES THAT LEAD TO SHARPLY DISPARATE RESULTS	7
II. THE CORRECT RULE IS THAT AN INADVERTENT DISCLOSURE DOES NOT WAIVE THE PRIVILEGE	13
III. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THIS IMPORTANT AND PERSISTENT QUESTION	23
CONCLUSION	26
APPENDICES	
APPENDIX A:	
Judgment Order of the United States Court of Appeals for the Third Circuit, entered May 12, 1995	1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B:

Order of the United States Court of Appeals for the Third Circuit denying rehearing, entered June 9, 1995 ..... 6a

APPENDIX C:

Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, entered October 19, 1994 ..... 11a

APPENDIX D:

Order of the United States District Court for the Middle District of Pennsylvania, entered January 13, 1995 ..... 17a

TABLE OF AUTHORITIES

Cases Page

6340 Transit Road, Inc. v. *Unigard Sec. Ins. Co.*, 619 N.Y.S.2d 1015 (App. Div. 1994) 19
Alldread v. *City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) 7, 10, 23
Barnes/Science Assocs. Ltd. Part. v. *Barnes Eng'g Co.*, No. CV89 02 77 64S, 1990 WL 283936 (Conn. Super. Ct. June 7, 1990) 20
Berg Electronics, Inc. v. *Molex, Inc.*, 875 F. Supp. 261 (D. Del. 1995) 10-11, 16, 17, 19
Bradt v. *Smith*, 634 F.2d 796 (5th Cir.), *cert. denied*, 454 U.S. 830 (1981) 15
Braxton v. *United States*, 500 U.S. 344 (1991) 13
Brookhart v. *Janis*, 384 U.S. 1 (1966) 16
Carter v. *Gibbs*, 909 F.2d 1450 (Fed. Cir. 1990) (en banc) 7, 19
CFTC v. *Weintraub*, 471 U.S. 343 (1985) 15, 17
Connecticut Mut. Life Ins. Co. v. *Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955) 8, 19
Edwards v. *Whitaker*, 868 F. Supp. 226 (M.D. Tenn. 1994) 8, 11
FDIC v. *Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D. Va. 1991) 9, 11, 22
FDIC v. *Singh*, 140 F.R.D. 252 (D. Me. 1992) 7, 12
Georgetown Manor, Inc. v. *Ethan Allen, Inc.*, 753 F. Supp. 936 (S.D. Fla. 1991) 8, 12
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 15
Golden Valley Microwave Foods, Inc. v. *Weaver Popcorn Co.*, 132 F.R.D. 204 (N.D. Ind. 1990) 9, 11, 22
Helman v. *Murry's Steaks, Inc.*, 728 F. Supp. 1099 (D. Del. 1990) 8, 12, 19
Hunt v. *Blackburn*, 128 U.S. 464 (1888) 15, 20
Hydraflow, Inc. v. *Enidine, Inc.*, 145 F.R.D. 626 (W.D.N.Y. 1993) 11
In re Grand Jury Investigation, 142 F.R.D. 276 (M.D.N.C. 1992) 8, 11
In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) 7, 9, 10, 22, 23
In re Sealed Case, 120 F.R.D. 66 (N.D. Ill. 1988) 19
In re Von Bulow, 828 F.2d 94 (2d Cir. 1987) 21

TABLE OF AUTHORITIES—Continued

Page

Jenkins v. *State of Indiana*, 627 N.E.2d 789 (Ind. 1993), *cert. denied*, 115 S. Ct. 64 (1994) 19
Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995) 16
John Morrell & Co. v. *Local Union 304A*, 913 F.2d 544 (8th Cir. 1990) 8, 10, 23
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 14
Kansas-Nebraska Natural Gas Co. v. *Marathon Oil Co.*, 109 F.R.D. 12 (D. Neb. 1985) 8, 12
KL Group v. *Case, Kay & Lynch*, 829 F.2d 909 (9th Cir. 1987) 20
Kusch v. *Ballard*, 645 So.2d 1035 (Fla. Dist. Ct. App. 1994) 19
Mallard v. *United States District Court*, 490 U.S. 296 (1989) 25
Maness v. *Meyers*, 419 U.S. 449 (1975) 15
Manufacturers & Traders Trust Co. v. *Servotronics*, 522 N.Y.S.2d 999 (App. Div. 1987) 18
Martin v. *Valley Nat'l Bank of Arizona*, No. 89 Civ. 8361, 1992 WL 196798 (S.D.N.Y. Aug. 6, 1992) 9, 22
Mendenhall v. *Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982) 8, 12, 14, 19
PacifiCorp v. *Department of Revenue*, 838 P.2d 914 (Mont. 1992) 20
Parkway Gallery Furniture, Inc. v. *Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46 (M.D.N.C. 1987) 9, 22
Pavlik v. *Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993) .. 10
Pitard v. *Stillwater Transfer & Storage Co.*, 589 So.2d 1127 (La. Ct. App. 1991), *writ denied*, 594 So.2d 1314 (La. 1992) 20
Powell v. *Alabama*, 287 U.S. 45 (1932) 14
Prudential Ins. Co. v. *Turner & Newall, PLC*, 137 F.R.D. 178 (D. Mass. 1991) 12
Republic Gear Co. v. *Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967) 16
Richardson-Merrell Inc. v. *Koller*, 472 U.S. 424 (1985) 15

TABLE OF AUTHORITIES—Continued

Page

Rotelli v. *7-Up Bottling Co. of Philadelphia*, No. 93-6957, 1995 WL 234171 (E.D. Pa. April 19, 1995) 8

Santrade, LTD v. *General Elec. Co.*, 150 F.R.D. 539 (E.D.N.C 1993) 9, 22

Shriver v. *Baskin-Robbins Ice Cream Co.*, 145 F.R.D. 112 (D. Colo. 1992) 20

Standard Chartered Bank PLC v. *Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76 (S.D.N.Y. 1986) .. 9, 22

Sterling v. *Keidan*, 412 N.W.2d 255 (Mich. Ct. App. 1987) 20

Strategem Development Corp. v. *Heron Int'l N.V.*, 153 F.R.D. 535 (S.D.N.Y. 1994) 12, 19

Texaco Puerto Rico, Inc. v. *Department of Consumer Affairs*, No. 94-2076, 1995 WL 415422 (1st Cir. July 19, 1995) 7, 9, 22, 23

Trammel v. *United States*, 445 U.S. 40 (1980) 14, 20

Trilogy Communications, Inc. v. *Excom Realty, Inc.*, 652 A.2d 1273 (N.J. Super. Ct. Law Div. 1994) 19, 20-21

United States v. *Ankeny*, 30 M.J. 10 (C.M.A. 1990) 8, 10, 23

United States v. *Jones*, 696 F.2d 1069 (4th Cir. 1982) (per curiam) 21

United States v. *Olano*, 113 S. Ct. 1770 (1993) 14

United States v. *Ryans*, 903 F.2d 731 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990) 7

United States v. *Schwimmer*, 892 F.2d 237 (2d Cir. 1989) 15

United States v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989) 8, 10, 13, 23

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) .. 13, 14, 16, 17, 25

Statutory and Regulatory Provisions

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1651 2

42 U.S.C. §§ 9601, *et seq.* 2

Fed. R. Evid. 501 ..... 2, 20, 25

S. Ct. Rule 10.1(a) 13

TABLE OF AUTHORITIES—Continued

Other

	Page
ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994)	18
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ABA Section on Litigation, The Attorney-Client Privilege and the Work-Product Doctrine (2d ed. 1989)	16
Black's Law Dictionary (5th ed. 1979)	14
R. Bowers, *Law of Waiver* (1914)	14
Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 Or. L. Rev. 637 (1986)	18, 21, 22
Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450 (1985)	13, 22
Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 Cath. U. L. Rev. 465 (1993)	12, 14, 18
Hundley, *"Inadvertent Waiver" of Evidentiary Privileges*, 19 S. Ill. U. L.J. 263 (1995)	23
Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605 (1986)	22
1 McCormick, *Evidence* (4th ed. 1992)	18, 21, 23
Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 Creighton L. Rev. 513 (1990)	15
Note, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pacific L.J. 59 (1986)	12
Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598 (1983)	18
Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464 (1977)	15
Notes of Advisory Committee on 1970 Amendments to Rule 26	20
Notes of Advisory Committee on 1993 Amendments to Rule 26	20
8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* (2d ed. 1994)	12

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PETITION FOR A WRIT OF CERTIORARI

Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Third Circuit denying mandamus is unreported and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Middle District of Pennsylvania is reprinted at App. 11a, and its opinion denying reconsideration is reprinted at App. 17a. Both opinions are reported at 885 F. Supp. 672.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1995. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion of rehearing in banc on June 9, 1995. *Id.* at 6a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1651. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT RULE

Rule 501 of the Federal Rules of Evidence provides in pertinent part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

The present dispute arose out of litigation brought by the United States in late 1993 under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* The litigation was brought against petitioners Keystone Sanitation Company, Inc., and its owners Kenneth F. Noel and Anna M. Noel (collectively "Keystone")—the owners of a landfill facility—and against respondent Arcata Graphics Fairfield, Inc. ("Arcata") and seven other companies (collectively "the Generator Defendants")[1] alleged to have generated hazardous waste that

[1] The Generator Defendants include, in addition to Arcata, C & J Clark America, Inc., The Esab Group, Inc., The Genlyte Group, Inc., Hanover Bronze and Aluminum Foundry, Inc., Kemper Industries, Inc., R.H. Sheppard Co., and SKF USA, Inc.

was transported to the facility. The Generator Defendants cross-claimed against Keystone,[2] and discovery commenced in January 1994. In connection with the deposition of a representative of Keystone Sanitation, Arcata sought documents regarding Keystone's June 1991 sale of certain assets to Waste Management, Inc. ("Waste Management"). Robert B. Hoffman of Reed Smith Shaw and McClay—counsel for Keystone—assembled and reviewed what he believed to be the responsive documents from the files of various Reed Smith attorneys involved in the Waste Management transaction. The documents produced completely filled two 10″ x 12″ x 16″ cardboard storage cartons. Exhibit F to Petition for Mandamus, at 5-6.

Inadvertently included among those documents were printed copies of two internal electronic mail ("e-mail") messages sent between Reed Smith attorneys. One states: "I see out [sic] major goal, apart from defending the environmental liability claims, is to encourage the Noels to take as much out of the corporation as they legitimately can do." App. 13a. Another e-mail contains a message stating that Florida law exempts a principal residence from levy by creditors in an unlimited amount. *Id.* Arcata subsequently requested that Keystone produce, among other things, billing statements of Reed Smith for legal services performed for Keystone from 1991 to the present in connection with any transfer of assets. Keystone agreed to produce such statements, with the identities of counsel and narrative descriptions of the services performed redacted. Keystone explained that the attorney-client privilege protected these portions of the billing statements from disclosure.[3]

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[2] The Generator Defendants also filed a third-party complaint against numerous other potentially responsible parties. *See supra* at ii-v.

[3] The District Court agreed that "the billing statements as [respondents] wish them to be produced would be protected by the

Dissatisfied with this production, Arcata moved to compel discovery of the unredacted billing statements. App. 12a. Arcata argued that the attorney-client privilege had been waived with respect to the billing statements because of the prior disclosure of the two e-mail messages. Arcata asserted that "[m]any courts have recognized that inadvertence is not an excuse that precludes a waiver," and argued that "[e]ven if the Court were to accept the line of authority that inadvertence may be an excuse in some situations," it should nonetheless still find a waiver. Exhibit D to Petition for Mandamus. Keystone contended that the e-mail messages were not subject to the attorney-client privilege, so their production could not form the basis for any finding of waiver. Alternatively, Keystone argued that the two messages

> constitute at most inadvertent production in a mass of material totalling about 10,000 pages, rather than a purposeful and selective disclosure of privileged communications. The clients did not participate in that document production, which related to Reed Smith files, and thus did not themselves consent to any waiver. [Exhibit C to Petition for Mandamus.]

In its Memorandum and Order of October 19, 1994, the District Court ruled that the inadvertently produced e-mail messages were subject to the attorney-client privilege, and that their prior production had waived the privilege with respect to any legal advice relating to Keystone's disposition of its assets. The Court accordingly ordered production of the unredacted billing statements. App. 16a.

The District Court began its analysis by noting that "[i]nadvertent disclosure may or may not require a finding of waiver," stating that "[m]any courts" look to a

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attorney-client privilege, absent a waiver." App. 14a. The court did not reach a decision on whether the identities of counsel performing services, standing alone, would be privileged. *Id.* at 14a n.1.

five-factor balancing test "to determine whether a document has lost its privilege through inadvertent disclosure." *Id.* at 14a. Applying this multi-factor test, the trial court concluded that "[t]he balance * * * weighs in favor of holding that the Keystone Defendants have waived any privilege that may have protected their attorneys' billing statements from disclosure with respect to the narrative of services and identities of attorneys performing services." *Id.* at 16a.

On reconsideration, the District Court acknowledged that its "decision was a difficult one, in the first place," but on review found itself "constrained to adhere to its prior ruling." *Id.* at 19a. The court granted a stay of its discovery order "to afford the Keystone Defendants the opportunity to petition the Third Circuit Court of Appeals for a Writ of Mandamus" on the waiver issue. *Id.* at 21a.

In their petition for mandamus, petitioners sought an order directing the District Court to vacate its order and to enter an order denying Arcata's motion to compel discovery of attorney-client communications. Petition for Mandamus, at 6. Petitioners reiterated their argument that the disclosure of the two e-mail messages could not waive the privilege because the messages themselves were not privileged.[4] Petitioners also reiterated their alternative argument that, even if the e-mail messages were privileged, their disclosure did not result in a waiver of the privilege with respect to the billing statements, because the disclosure of the e-mail was inadvertent.[5] The Third Circuit denied the petition for mandamus on May 12,

[4] Petitioners do not raise that argument here. As this case comes to this Court, therefore, it is undisputed that the e-mail messages were covered by the attorney-client privilege.

[5] In arguing that the inadvertent disclosure did not "waive[] [petitioners'] attorney-client privilege with regard to communica-

1995, *id.* at 1a, and denied a timely petition for rehearing on June 9, 1995. *Id.* at 6a.

REASONS FOR GRANTING THE WRIT

This case presents the straightforward legal questions whether the inadvertent disclosure of documents protected by the attorney-client privilege results in a waiver of that privilege and, if so, whether that waiver is limited to the documents inadvertently disclosed or extends to additional, otherwise privileged documents on the same subject that were not disclosed. These questions—which arise with increasing frequency in the federal courts—have precipitated a sharp conflict among the courts of appeals, a conflict expressly recognized by those courts, the district courts, and the commentators. The courts have acknowledged three quite distinct approaches to the initial question whether inadvertent disclosure results in waiver of the privilege. The courts have further split on the separate question whether any such waiver extends only to the documents inadvertently disclosed or covers other privileged documents on the same subject that were not disclosed. This case presents an opportunity for the Court to resolve both conflicts. It should grant the petition to do so.

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tions with their counsel concerning their rights and liabilities with regard to transfers of their assets," Petition for Mandamus, at 1, petitioners focused upon the billing statements for the simple reason that those statements were the subject of respondent Arcata's motion to compel and the resulting District Court decision. As explained below, *see infra* at 24, the fact that this case concerns the effect of the inadvertent disclosure on the privileged status of documents other than those disclosed is a compelling reason to grant review, because it affords this Court the opportunity to resolve both the conflict among the Circuits over whether an inadvertent disclosure waives the privilege and, if so, the conflict over whether any such waiver extends beyond the documents actually disclosed to other undisclosed privileged documents.

I. THE FEDERAL COURTS ARE DIVIDED AS TO THE EFFECT OF AN INADVERTENT DISCLOSURE OF INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND HAVE ADOPTED THREE DIFFERENT APPROACHES THAT LEAD TO SHARPLY DISPARATE RESULTS

In its October 19, 1994, Memorandum and Order, the District Court determined that Keystone had waived the attorney-client privilege because its counsel had produced the e-mail messages, even though that production was concededly inadvertent. In so doing, the court applied a five-factor test which it said "[m]any courts use * * * to determine whether a document has lost its privilege through inadvertent disclosure." App. 14a. As the District Court implicitly and correctly recognized, there is a split of authority in the federal courts as to the effect of an inadvertent disclosure of privileged documents.

Some courts apply the rule that any disclosure of information protected by the attorney-client privilege to a third party waives the privilege, whether or not the disclosure was inadvertent. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("We * * * agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent' ") (citation omitted); *Texaco Puerto Rico, Inc.* v. *Department of Consumer Affairs*, No. 94-2076, 1995 WL 415422, *15 (1st Cir. July 19, 1995); *FDIC* v. *Singh*, 140 F.R.D. 252, 253 (D. Me. 1992); *see also Carter* v. *Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (en banc) (dicta); *United States* v. *Ryans*, 903 F.2d 731, 741 n.13 (10th Cir.) (same), *cert. denied*, 498 U.S. 855 (1990).

Other courts employ the approach taken by the District Court in this case and consider the factual circumstances surrounding an inadvertent disclosure to determine if the privilege has been waived. *See, e.g., Alldread* v. *City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("In our view, an analysis which permits the court to consider

the circumstances surrounding a disclosure on a case-by-case basis is preferable to a *per se* rule of waiver."); *Rotelli* v. *7-Up Bottling Co. of Philadelphia,* No. 93-6957, 1995 WL 234171, *2 (E.D. Pa. April 19, 1995); *Edwards* v. *Whitaker,* 868 F. Supp. 226, 229 (M.D. Tenn. 1994); *In re Grand Jury Investigation,* 142 F.R.D. 276, 279 (M.D.N.C. 1992).

Still other courts hold that an inadvertent disclosure of privileged information does not waive the privilege. *See John Morrell & Co.* v. *Local Union 304A,* 913 F.2d 544, 556 (8th Cir. 1990) (party's express "waiver as to four documents did not waive its privilege as to the rest. The fact that the [opposing party] inadvertently gained access to the other documents does not affect this ruling."); *United States* v. *Ankeny,* 30 M.J. 10, 15-17 & n.6 (C.M.A. 1990); *United States* v. *Zolin,* 809 F.2d 1411, 1417 (9th Cir. 1987) (secretary's inadvertent delivery of tapes containing privileged material under mistaken impression tapes were blank "was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver"), *aff'd in part and vacated in part,* 491 U.S. 554 (1989);[6] *Georgetown Manor, Inc.* v. *Ethan Allen, Inc.,* 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Helman* v. *Murry's Steaks, Inc.,* 728 F. Supp. 1099, 1104 (D. Del. 1990); *Kansas-Nebraska Natural Gas Co.* v. *Marathon Oil Co.,* 109 F.R.D. 12, 21 (D. Neb. 1985); *Mendenhall* v. *Barber-Greene Co.,* 531 F. Supp. 951, 954-955 (N.D. Ill. 1982); *Connecticut Mut. Life Ins. Co.* v. *Shields,* 18 F.R.D. 448, 451 (S.D.N.Y. 1955).

Among those courts concluding that an inadvertent disclosure can waive the privilege, there is a further conflict concerning the *scope* of the waiver that results from such

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[6] In *Zolin* this Court noted that the Ninth Circuit's holding "that the privilege had not been waived when the [privileged materials] were inadvertently given" to a third party was "not at issue here." 491 U.S. at 563.

a disclosure. Some courts apply the rule that an inadvertent disclosure of privileged materials waives the privilege with respect to all other communications on the same subject matter as the disclosed materials. *See Texaco Puerto Rico, Inc., supra,* at *15; *Sealed Case,* 877 F.2d at 981; *Santrade, LTD* v. *General Elec. Co.,* 150 F.R.D. 539, 544 (E.D.N.C. 1993). Other courts, however, have held that an inadvertent disclosure waives the privilege only with respect to the documents actually disclosed. *See Martin* v. *Valley Nat'l Bank of Arizona,* No. 89 Civ. 8361, 1992 WL 196798, *4 (S.D.N.Y. Aug. 6, 1992); *FDIC* v. *Marine Midland Realty Credit Corp.,* 138 F.R.D. 479, 484 (E.D. Va. 1991); *Golden Valley Microwave Foods, Inc.* v. *Weaver Popcorn Co.,* 132 F.R.D. 204, 208 (N.D. Ind. 1990); *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987); *Standard Chartered Bank PLC* v. *Ayala Int'l Holdings (U.S.) Inc.,* 111 F.R.D. 76, 85 (S.D.N.Y. 1986).[7] The District Court in this case adopted the former approach when it ordered Reed Smith to disclose unredacted copies of its billing statements related to Keystone's disposition of its assets, solely because of the inadvertent disclosure of two e-mail messages allegedly concerning that subject. App. 16a.

These entrenched conflicts over the consequences of the inadvertent disclosure of privileged documents have not gone unnoticed by the federal Courts of Appeals themselves. As the Eighth Circuit recently observed:

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[7] Some of these courts have said that they would find a subject matter waiver if "it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure." *Parkway Gallery,* 116 F.R.D. at 52. To the extent the disclosure was made with a tactical objective, a finding of waiver is not actually a qualification of or exception to the general rule of nonwaiver, because such selective disclosure cannot properly be regarded as "inadvertent" in the first place.

> The issue of whether documents claimed to be privileged may be withdrawn when they are inadvertently produced in discovery is a question of first impression in this Circuit. Courts in other jurisdictions reaching the question have adopted three positions: there is no waiver of the privilege if the document is inadvertently produced because the privilege must be knowingly waived; the privilege is always waived even if the document is inadvertently produced because the confidentiality of the document is lost once the document is produced; or the privilege may or may not be waived depending upon the results of an ad hoc balancing test * * *. [*Pavlik* v. *Cargill, Inc.*, 9 F.3d 710, 713 (1993).[8]]

The Fifth Circuit also acknowledged recently that "[t]here is no consensus * * * as to the effect of inadvertent disclosures of confidential communications," *Alldread*, 988 F.2d at 1434 (citations omitted), and the Court of Military Appeals has observed that "[c]ivilian courts have taken varying positions on the inadvertent-disclosure problem." *Ankeny*, 30 M.J. at 17 n.6 (contrasting, *inter alia*, the Ninth Circuit's decision in *Zolin* with the D.C. Circuit's decision in *Sealed Case*).

Federal district courts, which must apply the privilege and waiver rules in the first instance, have repeatedly remarked upon the unsettled state of the law. As the court explained earlier this year in *Berg Electronics, Inc.*

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[8] The *Pavlik* court did not take a position on the conflict, ruling instead that any error committed below was harmless. 9 F.3d at 713. Although the *Pavlik* court described the issue as one of first impression in the Eighth Circuit, a prior panel had ruled that inadvertent disclosure does not waive the attorney-client privilege. In *John Morrell & Co.*, 913 F.2d at 555-556, the district court ruled that the attorney-client privilege barred the admission at trial of inadvertently disclosed documents. The Court of Appeals affirmed, concluding that an express waiver of the privilege as to certain documents did not extend to others inadvertently disclosed, and "[t]he fact that the [party seeking admission] inadvertently gained access to the other documents does not affect this ruling." *Id.* at 556.

v. *Molex, Inc.*, 875 F. Supp. 261, 262-263 (D. Del. 1995) (citations omitted):

> Courts have followed three general approaches in deciding whether the inadvertent production of a document that contains a confidential attorney-client communication waives the privilege. Some courts have found that inadvertently producing the document does waive the privilege. * * * Other courts have looked to the general circumstances surrounding the disclosure of the documents to determine whether finding a waiver would be fair and reasonable. * * * Still other courts have found that the mere inadvertent production of documents by counsel does not waive the privilege.

The *Berg Electronics* court criticized the first approach as taking from the client the ability to control waiver of the privilege, contrary to Supreme Court precedent, and the second as resulting in an "uncertain privilege" which would invite litigation. The court embraced the third approach, adopting the general rule that inadvertent disclosure does not waive the privilege. *Id.*

The court in *Golden Valley*, 132 F.R.D. at 208, described the question as "a legal thicket which is difficult to chop through," noting that the courts have followed "three divergent paths: a subjective analysis, an objective analysis, and a balancing test." The court in *Marine Midland*, 138 F.R.D. at 480-481, similarly viewed the issue as a "knotty question" that "has spawned three distinct lines of authority." *See also Edwards* v. *Whitaker*, 868 F. Supp. at 228 ("three lines of authority with regard to the claim of inadvertent disclosure"); *Hydraflow, Inc.* v. *Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) ("There are three distinct lines of federal judicial authority on the question of the effect of an inadvertent disclosure."); *In re Grand Jury Investigation*, 142 F.R.D. at 278 ("three distinct lines of authority on the question of whether inadvertent disclosure during discovery proceedings causes a waiver of the attorney-client privilege");

FDIC v. *Singh*, 140 F.R.D. at 253 ("courts have resolved the issue in one of three ways"); *Prudential Ins. Co.* v. *Turner & Newall, PLC*, 137 F.R.D. 178, 182 (D. Mass. 1991) ("courts have resolved the question of whether unintentional disclosure of protected material results in a waiver in three ways"); *Georgetown Manor*, 753 F. Supp. at 937-938 ("the federal courts are divided on the issue of whether an inadvertent disclosure of attorney-client privileged communications by a party's counsel to the adversary is a waiver of the privilege. * * * [T]he better-reasoned rule is * * * that mere inadvertent production by the attorney does not waive the client's privilege."); *Helman*, 728 F. Supp. at 1104 (noting contrary authority but concluding that the "better-reasoned rule * * * provides that inadvertent disclosure does not waive the privilege"); *Kansas-Nebraska Natural Gas*, 109 F.R.D. at 21 (same); *Mendenhall*, 531 F. Supp. at 954 (same); *Strategem Development Corp.* v. *Heron Int'l N.V.*, 153 F.R.D. 535, 544 n.12 (S.D.N.Y. 1994) (noting conflicting cases "from other jurisdictions" but concluding that "[p]ursuant to the law in this District, however, inadvertent disclosure does not result in a waiver of the attorney-client privilege").

Commentators, too, have remarked upon the persistent split of authority. *See* Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 Cath. U. L. Rev. 465, 471 (1993) ("Federal circuit courts of appeal and district courts currently employ three tests for deciding whether the inadvertent production of a privileged document waives the attorney-client privilege"); 8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2016.2, at 241 (2d ed. 1994) ("As the courts themselves recognize, they have split into at least three camps" on the advertent disclosure issue); Note, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pacific L.J. 59, 60 (1986) (courts "have ap-

proached the [inadvertent disclosure] problem in one of three ways").

Finally, this Court has itself noted the existence of the "controversy concerning the legal effect of an inadvertent disclosure which does not constitute a waiver of the privilege." *United States* v. *Zolin*, 491 U.S. 554, 573 n.11 (1989) (citing *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1648, 1660-61 (1985)). The cited work notes that "[c]ourts have taken a variety of waiver approaches to these inadvertent disclosures." *Developments in the Law*, 98 Harv. L. Rev. at 1660.

This is, therefore, not a situation in which the existence of a conflict needs to be inferred from an analysis of allegedly conflicting cases. The Courts of Appeals themselves have expressly acknowledged their disagreement; it has been confirmed by the commentators; and there is no reason to suppose that it will abate in the absence of action by this Court. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"); S. Ct. Rule 10.1(a).

II. THE CORRECT RULE IS THAT AN INADVERTENT DISCLOSURE DOES NOT WAIVE THE PRIVILEGE

Of the three approaches just described, the rule that an attorney's inadvertent disclosure cannot waive the privilege is the one that has the most to commend it "in the light of reason and experience." Fed. R. Evid. 501. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (citation omitted). The privilege "rests on the need for the advo-

cate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States*, 445 U.S. 40, 51 (1980).

A "waiver," this Court has said many times, is "the intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). *Accord United States* v. *Olano*, 113 S. Ct. 1770, 1777 (1993); *Black's Law Dictionary* 1580 (6th ed. 1990); *see also* R. Bowers, *Law of Waiver* 19 (1914) ("Waiver is the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit"). Accordingly, where an attorney inadvertently discloses a privileged communication to a third party, and does so without the knowledge or consent of the client, there has by definition been no "waiver" of the privilege. "We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.' Inadvertent production is the antithesis of that concept." *Mendenhall* v. *Barber-Greene Co.*, 531 F. Supp. at 955 (footnote omitted; quoting *Zerbst*).

It is appropriate to apply the *Zerbst* standard in this context because the attorney-client privilege is no ordinary privilege but rather "has traditionally been viewed as sacred and inviolable." Harding, 42 Cath. U. L. Rev. at 482 n.84. As this Court observed in *Upjohn*, the attorney-client privilege is the oldest of its kind known to the common law and advances important public goals linked to the administration of justice. More importantly than that, respecting the confidentiality of attorney-client communications is necessary to effectuate the constitutional right to retain counsel, a right that obtains in criminal and civil cases.[9] "Without the attorney-client privi-

[9] As this Court has recognized, civil litigants have a right to retain counsel by virtue of the Fifth and Fourteenth Amendments. *See Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (it "may not be

lege," that right "would in large part be rendered meaningless." *United States* v. *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).[10] In sum, the attorney-client privilege, like other fundamental rights, should only be deemed waived if it has been intentionally relinquished.[11]

A waiver of the privilege cannot be grounded upon the theory that an attorney has implied authority to waive the privilege on behalf of his client. As this Court noted long ago, "the privilege is that of the client alone." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). *See also CFTC* v. *Weintraub*, 471 U.S. 343, 348 (1985) ("the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors"). There can therefore be no waiver of the privilege where, as here, the

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doubted" that "to refuse to hear a party by counsel" would violate due process "in any case, civil or criminal"); *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970) (welfare benefits recipient "must be allowed to retain an attorney if he so desires" to represent him in a benefits termination hearing); *Maness* v. *Meyers*, 419 U.S. 449, 471 (1975) (Stewart, J., concurring in the result) ("the Court [in *Powell*] recognized a due process right to retained counsel in civil proceedings"); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (referring to the "right of counsel of choice in civil cases").

[10] Indeed, some have expressed the view that the privilege is itself a right of constitutional dimension. *See Maness* v. *Meyers*, 419 U.S. at 472 (Stewart, J., concurring in the result) (referring in a civil case to "the constitutionally protected attorney-client relationship"); *Bradt* v. *Smith*, 634 F.2d 796, 800 n.4 (5th Cir.) (the privilege "assume[s] constitutional significance" in some cases), *cert. denied*, 454 U.S. 830 (1981); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 485-486 (1977) (arguing that the privilege is constitutionally required in criminal cases).

[11] *See also* Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 Creighton L. Rev. 513, 514 (1990) (arguing that "[a]n economic analysis shows that there is no reason for departing from the traditional requirement that a waiver be knowing and voluntary").

client had no knowledge of and did not consent to his attorney's disclosure of the privileged materials. *See* ABA Section on Litigation, The Attorney-Client Privilege and the Work-Product Doctrine 66 (2d ed. 1989). As is the case with other fundamental rights, an attorney cannot "waive the privilege without his client's consent to the waiver." *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967); *cf. Brookhart* v. *Janis*, 384 U.S. 1 (1966) (defense counsel cannot waive the defendant's right to confront and cross-examine adverse witnesses without the defendant's consent).

The approach of the D.C. and First Circuits (and the Tenth and Federal Circuits in dicta)—dismissing the inadvertence of a disclosure as irrelevant—is contrary to this Court's teachings on the nature of the privilege and the prerequisites to its waiver. The middle approach embraced by the Fifth Circuit—a multi-factor balancing test—has all of these flaws plus the additional one of uncertainty. A privilege can only serve its purpose if it is clear and certain in application. As this Court has explained, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Here, as was the case in *Upjohn*, "[t]he very terms of the test adopted by the court below suggest the unpredictability of its application." *Id.* Just last Term this Court rejected a proposed multi-factor test, declining to abandon relative certainty "for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995). Those same consequences would inevitably accompany adoption of the five-factor balancing test embraced below. *See Berg Electronics*, 875 F. Supp. at 262-263.

The rule applied in the Eighth and Ninth Circuits and advocated by petitioners best serves the purposes of the attorney-client privilege. The core purpose of the privilege

is to foster open and honest communication between attorneys and their clients. *See Upjohn*, 449 U.S. at 389; *CFTC* v. *Weintraub*, 471 U.S. at 348. In addition, by encouraging candor, the privilege helps ensure that individuals will be better informed about the requirements of the law and thus more likely to engage in law-abiding behavior. *Id.* These goals, however, are sorely undermined by a rule that grounds a waiver of the privilege on mere inadvertent disclosures. Clients who are fearful that their confidences might slip through their attorneys' fingers might well choose not to say anything at all. *See Berg Electronics*, 875 F. Supp. at 263 (petitioners' rule "best serves the interests of the attorney-client privilege, as it protects the client from the apprehension that consultations with their legal advisors will be inadvertently disclosed and applies the privilege in a way that is predictable and certain").

Finally, the realities of modern litigation strongly favor the rule that an inadvertent disclosure of privileged materials does not waive the privilege. The rise of liberal discovery rules and technologies that have made it easy to copy and share documents—such as the photocopier, fax machine, and e-mail—have combined to make it all but impossible for even the most diligent counsel to assure that no privileged material passes to the opposition in the course of a substantial document production. As one commentator has observed:

> Given the scope of modern discovery and the realities of contemporary litigation, a question of great practical importance today is whether a voluntary but inadvertent disclosure should result in a waiver. In earlier times, the burden of avoiding such a disclosure of privileged [documents], and the consequent waiver of the privilege, was relatively slight compared to that encountered today where enormous quantities of documents may be sought by an opponent through discovery. Under current conditions, some privileged material is likely to pass through

> even the most tightly woven screen. [1 McCormick, *Evidence* § 93, at 342 (4th ed. 1992) (footnotes omitted).[12]]

The ease with which a privileged document can be inadvertently produced has even been recognized by the American Bar Association, and that recognition has influenced its pronouncements upon the ethical obligations of the bar. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994) (slip op. 2) ("in this advanced technological age with its frequent use of facsimile machines and electronic mail, * * * inadvertent disclosures frequently occur"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (slip op. 1) ("the burgeoning of multiparty cases, the availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine").[13]

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[12] *See also Manufacturers & Traders Trust Co.* v. *Servotronics*, 522 N.Y.S.2d 999, 1003 (App. Div. 1987) (commenting upon "the prevalence of corporate litigation involving voluminous discovery material and the inevitability that some privileged documents will be released"); Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 Or. L. Rev. 637, 653 (1986) ("In a big case, * * * some inadvertent production is almost inevitable"); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598, 599 (1983) ("The problem of inadvertent disclosure * * * has become increasingly common as litigation and document productions grow in size") (footnotes omitted); Harding, 42 Cath. U. L. Rev. at 465-466 ("The inadvertent production of documents protected by the attorney-client privilege frequently occurs in contemporary litigation") (footnotes omitted).

[13] The ABA concluded in Opinion No. 368 that a lawyer who receives through inadvertence materials that on their face appear to be subject to the attorney-client privilege is ethically required to refrain from examining the materials. In Opinion No. 382, the ABA similarly determined that a lawyer must refrain from exam-

Thus, although the notion that a party must jealously guard "the confidentiality of attorney-client communications like jewels—if not crown jewels," *Sealed Case*, 877 F.2d at 980, is a romantic one, it simply does not comport with the realities of modern day litigation.[14] In this regard, it is significant and noteworthy that those federal jurisdictions in which a large number of document-intensive corporate and securities cases are litigated follow the rule that petitioners advocate. *See Strategem Development Corp.* v. *Heron Int'l*, 153 F.R.D. at 543-544 & n.12 (S.D.N.Y.); *Connecticut Mut. Life Ins. Co.* v. *Shields*, 18 F.R.D. at 451 (S.D.N.Y.); *Berg Electronics* v. *Molex*, 875 F. Supp. at 263 (D. Del.); *Helman* v. *Murry's Steaks*, 728 F. Supp. at 1104 (D. Del.); *In re Sealed Case*, 120 F.R.D. 66, 72 (N.D. Ill. 1988); *Mendenhall* v. *Barber-Greene Co.*, 531 F. Supp. at 954-955 (N.D. Ill.). The rule applied by these courts, which grapple most frequently with the problem of inadvertent disclosure, is the correct rule.[15]

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ining privileged materials that he has received on an unauthorized basis. If ethical considerations forbid an attorney from making use of privileged materials which were inadvertently disclosed or disclosed without authorization, it would seem that such disclosures should not be deemed to waive the privilege.

[14] No litigant is immune from these difficulties. In *Carter* v. *Gibbs*, 909 F.2d at 1451, the United States sought to claim the privilege with respect to a document it had inadvertently disclosed. The United States argued that the privilege had not been waived because the disclosure was inadvertent, a fact the Federal Circuit dismissed in dicta as "irrelevant". *Id.*

[15] A number of state courts have recently adopted the rule that no waiver results from an inadvertent disclosure. *See, e.g., Trilogy Communications, Inc.* v. *Excom Realty, Inc.*, 652 A.2d 1273, 1274-76 (N.J. Super. Ct. Law Div. 1994); *Kusch* v. *Ballard*, 645 So.2d 1035, 1037-40 (Fla. Dist. Ct. App. 1994) (Stevenson, J., concurring in part and dissenting in part); *id.* at 1035 (Glickstein, J., concurring specially) (agreeing with Judge Stevenson); *6340 Transit Road, Inc.* v. *Unigard Sec. Ins. Co.*, 619 N.Y.S.2d 1015, 1015 (N.Y. App. Div. 1994); *Jenkins* v. *State of Indiana*, 627 N.E.2d 789, 798

The rule that inadvertent disclosure does not waive the privilege not only advances the policies of the attorney-client privilege but also the policies underlying the discovery rules of the Federal Rules of Civil Procedure. Those Rules, particularly as amended in 1993, contemplate an expeditious discovery regime with a minimum of litigation and judicial involvement. *See* Notes of Advisory Committee on 1993 Amendments to Rule 26 ("A major purpose of this revision is to accelerate the exchange of basic information"); Notes of Advisory Committee on 1970 Amendments to Rule 26 ("changes in the mechanics of discovery [were] designed to encourage extrajudicial discovery with a minimum of court intervention"). In the absence of a rule protecting privileged materials in the event of inadvertent disclosure or at least restricting any waiver to documents actually disclosed, parties can be expected generally to be more guarded in their responses to discovery requests. This, in turn, will embroil the courts in the business of refereeing discovery battles with increased frequency. *See Trilogy Communications, Inc.* v. *Excom Realty, Inc.*, 652 A.2d at 1277 (holding that inadvertent disclosure does not waive the privilege

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(Ind. 1993) (work product privilege), *cert. denied*, 115 S. Ct. 64 (1994); *PacifiCorp* v. *Department of Revenue*, 838 P.2d 914, 919-920 (Mont. 1992); *Pitard* v. *Stillwater Transfer & Storage Co.*, 589 So.2d 1127, 1128-29 (La. Ct. App. 1991), *writ denied*, 594 So.2d 1314 (La. 1992); *Barnes/Science Assocs. Ltd. Part.* v. *Barnes Eng'g Co.*, No. CV89 02 77 64S, 1990 WL 283936 (Conn. Super. Ct. June 7, 1990); *Sterling* v. *Keidan*, 412 N.W.2d 255, 258 (Mich. Ct. App. 1987); *see also KL Group* v. *Case, Kay & Lynch*, 829 F.2d 909, 918-919 (9th Cir. 1987) (applying California and Hawaii law); *Shriver* v. *Baskin-Robbins Ice Cream Co.*, 145 F.R.D. 112, 115-116 (D. Colo. 1992) (applying Colorado law).

Federal Rule of Evidence 501 specifies that privilege questions "shall be governed by the principles of the common law," and this clear trend is highly pertinent in assessing those principles. *See, e.g., Trammel* v. *United States*, 445 U.S. at 49 (selection of a rule governing the privilege against adverse spousal testimony in federal courts influenced by "[t]he trend in state law toward" adopting the rule).

because "[t]o hold otherwise would ignore the realities of modern litigation; the need to resolve matters quickly and inexpensively; time requirements of the court rules for the production of documents and discovery strictly enforced by case management orders and other techniques; and the volume of documents often required to be produced in complex litigation").

Because an inadvertent disclosure of privileged materials does not waive the privilege with respect to those materials, it follows *a fortiori* that such a disclosure does not waive the privilege with respect to any other, undisclosed materials. But even if an inadvertent disclosure were considered to result in a waiver of some magnitude, that waiver ought to be limited to the materials actually disclosed.

The general rule is that the *voluntary* revelation of a privileged communication results in a "subject matter waiver"—*i.e.*, a waiver of the privilege with respect to all other communications on the same subject. *See Hunt* v. *Blackburn*, 128 U.S. at 470-471; *United States* v. *Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam); 1 McCormick, *supra*, § 93, at 343. The rule is designed to prevent parties from selectively disclosing privileged information in order thereby to obtain an advantage. *See In re Von Bulow*, 828 F.2d 94, 101-102 (2d Cir. 1987); Davidson & Voth, 64 Or. L. Rev. at 639-640, 651.

This concern is, however, entirely absent in the context of an inadvertent disclosure. Because an inadvertent disclosure is by definition unintentional, there is no risk that the disclosure was a strategic ploy. Thus, a number of courts have correctly reasoned that "[t]he general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure."

Parkway Gallery, 116 F.R.D. at 52; *see also, e.g., Martin* v. *Valley Nat'l Bank of Arizona, supra* at *4; *FDIC* v. *Marine Midland Realty Credit Corp.*, 138 F.R.D. at 484; *Golden Valley Microwave Foods*, 132 F.R.D. at 208; *Standard Chartered Bank PLC* v. *Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. at 85.

Commentators, too, have sharply criticized the application of the subject matter waiver rule to inadvertent disclosures. *See* Davidson & Voth, 64 Or. L. Rev. at 650 ('Perhaps the most malignant and ill-considered doctrine concerning waiver of privilege is the rule that disclosing one privileged communication—however inadvertently—constitutes a waiver of all privileged communications on the same subject matter"); *Developments in the Law*, 98 Harv. L. Rev. at 1664 (arguing that a "waiver of undisclosed matter is never appropriate to an inadvertent disclosure"); Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1636 (1986).

Other courts, however—like the courts below—have applied the subject matter waiver rule in the case of inadvertent disclosures. *See, e.g., Texaco Puerto Rico, Inc., supra*, at *15; *Sealed Case*, 877 F.2d at 981; *Santrade, LTD*, 150 F.R.D. at 544. The conflict is stark. *Contrast, e.g., Sealed Case*, 877 F.2d at 980-981 (applying in case of waiver by inadvertent disclosure of one document rule that waiver extends "to all other communications relating to the same subject matter") (quotation omitted) *with Golden Valley*, 132 F.R.D. at 208 ("The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure") (quotation omitted). This Court should grant the petition to resolve the conflict.

III. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THIS IMPORTANT AND PERSISTENT QUESTION

The question presented in this case is an important one worthy of this Court's attention. Given technological developments and the rise of large-scale, multi-party litigation, inadvertent disclosure is an increasingly common phenomenon in discovery, and the question whether an inadvertent disclosure waives the attorney-client privilege is thus, as one leading commentator has remarked, "a question of great practical importance today." 1 McCormick, *supra,* § 93, at 342. Furthermore, it is "[o]ne of the most vigorously-debated evidentiary issues in federal courts and in the periodical literature of litigation." Hundley, *"Inadvertent Waiver" of Evidentiary Privileges,* 19 S. Ill. U. L.J. 263, 263 (1995). Indeed, as noted previously, there is a three-way conflict among the Courts of Appeals on this issue. *Compare Sealed Case* (D.C. Cir.) (inadvertent disclosure waives the privilege) and *Texaco Puerto Rico, Inc.* (1st Cir.) (same) *with Alldread* (5th Cir.) (inadvertent disclosure may or may not waive the privilege) *with Zolin* (9th Cir.) (inadvertent disclosure does not waive the privilege), *John Morrell & Co.* (8th Cir.) (same), *and Ankeny* (C.M.A.) (same). The District Courts are also deeply divided along these lines.

The resolution of this conflict will not benefit from further percolation in the lower courts. This is not a new division among the lower courts; it is a sharp and entrenched conflict, one repeatedly noted by the courts themselves and commentators. The merits of the various positions have been fully aired in the numerous opinions on the issue; what is needed is not further debate but a definitive resolution so that the privilege does not mean one thing in the District of Columbia and First Circuits, another in the Eighth and Ninth, and yet another in the Third and Fifth. Only this Court can provide that resolution.

This Court should resolve these hotly-contested issues in this case. There is no question but that the documents in this case were, as the District Court recognized, "inadvertently disclosed." App. 18a. There is also no dispute before this Court that the disclosed documents were privileged. *See id.* at 18a-19a; *supra* 4-5 & n.4. There are no other factual issues that need to be resolved before confronting the legal questions that have so sharply divided the lower courts. Furthermore, it is clear that both the District Court and the Court of Appeals directly ruled upon the issue. The District Court adopted the view that an inadvertent disclosure can sometimes waive the privilege and the Court of Appeals considered, and rejected, the contention that the District Court "erred in finding that petitioners had waived their attorney-client privilege with regard to communications with their counsel concerning their rights and liabilities with regard to transfers of their assets." App. 5a. Thus, the issues upon which the lower federal courts have split are squarely presented in this case.

This case presents an ideal vehicle for the Court to resolve these conflicts, because the issue here concerns whether documents other than those inadvertently disclosed lose their privileged status by virtue of the inadvertent disclosure. The facts in this case thus afford the Court the opportunity to consider not only whether inadvertent disclosure can result in a waiver of the privilege, but also whether such waiver—if there is any—can extend beyond the documents which were actually disclosed. If the Court were to grant certiorari in a case in which the discovery dispute was over the disclosed documents themselves, it would necessarily have to await another case to decide the scope of any waiver. This case would allow the Court to address both issues and fully answer the questions that have divided the lower courts.

The fact that the legal issues were presented to the Third Circuit on a petition for mandamus is no impedi-

ment to this Court's review. *See, e.g., Mallard* v. *United States District Court,* 490 U.S. 296 (1989) (reviewing court of appeals order denying mandamus to resolve conflict among the Circuits). Because a trial court order requiring the production of documents is interlocutory and hence not immediately appealable, appellate review of such orders often occurs by way of mandamus.

In his separate opinion in *Upjohn,* Chief Justice Burger noted:

> [B]ecause Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly before us. [449 U.S. at 403-404 (concurring in part and in the judgment).]

The lower federal courts are in disarray as to the consequences of an inadvertent disclosure of privileged documents: they apply three very different approaches to determine whether such disclosure leads to a waiver of the privilege, and two very different rules to determine the scope of any waiver. This Court's "special duty to clarify aspects of the law of privileges" is plainly implicated in this case. The Court should grant certiorari to resolve the conflict in the lower courts on these important and recurring questions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR. *
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Petitioners

* Counsel of Record